

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JACKIE (JACK) RAKES,

Plaintiff,

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant.

Civ. No. 07-CV-0059-TC

ORDER AND OPINION

Coffin, Magistrate Judge:

Plaintiff, Jackie Rakes, seeks review of a final decision of the Commissioner denying his application for Social Security disability and Supplemental Security Income disability benefits. Before the court is plaintiff's brief (#16). For the reasons that follow, the decision of the Commissioner is reversed and the matter remanded for further proceedings.

Background

Plaintiff applied for SSI and DIB benefits, citing a number of mental and physical complaints. His claim was denied

1 initially and upon reconsideration. The record reveals a
2 collection of evidence from plaintiff's associates, physicians,
3 and lay witnesses concerning his various physical and mental
4 limitations.

5 The ALJ concluded that although plaintiff suffered severe
6 impairments (degenerative joint disease of the left knee and
7 personality disorder), his combination of impairments did not
8 meet or equal the requirements of a listed impairment and he was
9 able to perform work existing in significant numbers in the
10 national economy. Tr. 20.

11 12 Discussion

13 Plaintiff asserts a number of grounds for reversal. Because
14 the court reverses on the first two asserted grounds, which may
15 affect the determination of plaintiff's impairment upon remand
16 (and determinations at subsequent steps of the sequential
17 evaluation process upon remand) the court does not address
18 plaintiff's subsequent arguments, which concern findings at steps
19 4 and 5.

20 Plaintiff first asserts that the ALJ erred in rejecting lay
21 witness testimony and a written statement from a lay witness
22 about plaintiff's limitations. Specifically, plaintiff argues
23 that the ALJ impermissibly rejected the written statements of (1)
24 Loretta Herron, plaintiff's daughter-in-law, (2) Thomas Sanford,
25 and (3) John Herron; and the hearing testimony of Dave Ross,
26 plaintiff's housemate and former boss.

27 Ms. Herron's witness statement indicates that she had seen
28 plaintiff once or twice per week over the last year or two. Tr.

1 309. She described him as experiencing marked problems with the
2 activities or daily living and explained that plaintiff's wife
3 grooms him, cleans the house, and does the shopping and cooking.
4 Tr. 309-33. She further stated that he had marked problems with
5 social functioning, and explained that he "takes time to express
6 feelings of endearment." Tr. 310. She described moderate
7 problems with concentration, persistence, or pace, noting that
8 plaintiff "has trouble staying focused." Tr. 311. She also
9 stated that plaintiff suffered a moderate level of episodes of
10 decompensation, and that he "loses motivation and concentration
11 easily." Tr. 312. According to Ms. Herron, plaintiff's back and
12 leg pain require him to shift more than once every two hours, Tr.
13 315, and his arm and leg pain disrupt his walking and standing
14 more than half the time. Tr. 315.

15 Mr. Sanford's statement described plaintiff's reduced
16 concentration, volatile moods, leg and arm pain, and low
17 motivation. Tr. 296-97, 300. Mr. Herron's statement described
18 plaintiff as depressed, easily angered and distracted, always
19 changing his mind, suffering leg and arm difficulty, always
20 appearing to be in pain, and ignoring his safety due to pain.
21 Tr. 326-27, 300, 336-38.

22 Mr. Ross testified that plaintiff tired easily, suffered a
23 50 percent reduction in his speed and pace, took weekly absences
24 when working, was limited to walking a block at a time, got "worn
25 out easily," rubbed his arm, leg, and knee in response to
26 discomfort, and dropped items from his hands. Tr. 631-36.

27 The ALJ noted the existence of Mr. Ross's testimony but made
28 no mention of the statements of Mr. Herron or Mr. Sanford. The

Tr. 22.

Regarding Ms. Herron's statement, I find that the ALJ erred in rejecting it on the basis that the witness was not a medical or vocational expert. As plaintiff explains, upholding such a rationale would obviate the role of lay witnesses in any proceeding concerning an appeal from a denial of social security benefits, and as such, it is contrary to law. I add that the Commissioner's attempt to persuade the court to understand the ALJ's statement to express an entirely different rationale - that Ms. Herron's statements were inconsistent with the medical evidence - is unavailing and does not assist the court.

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1 "medical records simply fail to support" Mr. Ross's testimony
2 reflects a misunderstanding of the applicable law. Although an
3 ALJ may reject lay witness testimony that conflicts with medical
4 evidence, see Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001),
5 an ALJ must "consider the testimony of lay witnesses where the
6 claimant's alleged symptoms are unsupported by [his] medical
7 records," Smolen, 80 F.3d at 1289. The ALJ therefore erred in
8 failing to consider Mr. Ross's testimony due to lack of
9 corroborating medical evidence.

10 Regarding the statements of Mr. Herron and Mr. Sanford, the
11 Commissioner concedes that the ALJ erred in rejecting them
12 without having stated a basis for doing so. The ALJ contends,
13 however, that the error is harmless because all reasonable ALJs
14 would agree that, once those statements were considered, the
15 disability determination would remain the same. I disagree. In
16 view of the frequency, variety, and severity of the symptoms
17 reported in the statements of those lay witnesses, it is not
18 beyond dispute that a different determination concerning RFC and,
19 in turn, disability, could be reached.

20 Plaintiff next asserts that the ALJ erred by rejecting the
21 opinions of a treating physician's assistant, Ericka Wilson, who
22 examined plaintiff under the supervision of a physician. Wilson
23 stated that plaintiff "[h]as been unable to work due to chronic
24 and unremitting left knee pain and low back pain," noted that
25 plaintiff awaited approval for further evaluation by a physician
26 and concluded, "[u]ntil that time, [he] will continue to be
27 unable to work." Tr. 401.

28 Under 20 C.F.R. § 416.913(d), the assessment of a
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1 physician's assistant is among "other sources" that a claimant
 2 might employ to show the severity of an impairment or its effect
 3 on one's ability to work. The ALJ reported that he gave Wilson's
 4 opinion "little weight" because her "records are nothing more
 5 than a reiteration of the claimant's pain complaints with little
 6 objective evidence to support the severity of such." Tr. 21-22.
 7 An evaluation of Wilson's records indicates that those records
 8 contain objective, clinical evaluations of plaintiff based on
 9 examinations during multiple visits and diagnostic tests, not
 10 plaintiff's own subjective pain reports. Tr. 398-416. Because
 11 the ALJ's basis for rejecting Wilson's opinion does not comport
 12 with the record, it is not supported by substantial evidence.¹

13 Conclusion

14 The decision of the Commissioner is reversed and the matter
 15 remanded for further proceedings.

16
 17 IT IS SO ORDERED.

18
 19 Dated this 1 day of February, 2008.

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 22 
 23 _____
 24 THOMAS M. COFFIN
 United States Magistrate Judge

25 ¹The Commissioner provides a number of post hoc bases for
 26 according "little weight" to Wilson's statement. Because I review the
 27 ALJ's determination according to his stated basis, I find the
 28 Commissioner's alternative arguments unavailing. See SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (reviewing court evaluates the propriety of an administrative agency's determination "solely by the grounds invoked by that agency").